

St. John's Law Review

Volume 66
Number 1 *Volume 66, Winter 1992, Number 1*

Article 7

April 2012

The Second Circuit Takes Off in a New Direction: Airport Terminals Deemed Nonpublic Fora in *International Society for Krishna Consciousness, Inc. v. Lee*

Barbara Lynn Hall

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Hall, Barbara Lynn (1992) "The Second Circuit Takes Off in a New Direction: Airport Terminals Deemed Nonpublic Fora in *International Society for Krishna Consciousness, Inc. v. Lee*," *St. John's Law Review*: Vol. 66 : No. 1 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol66/iss1/7>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact seljbyc@stjohns.edu.

COMMENT

THE SECOND CIRCUIT TAKES OFF IN A NEW DIRECTION: AIRPORT TERMINALS DEEMED NONPUBLIC FORA IN *INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. v. LEE*

The First Amendment to the United States Constitution broadly guarantees freedom of speech and expression against government regulation.¹ First Amendment protections, however, do not exempt all speech from government restrictions under all circumstances.² Pursuant to what is known as the "public-forum doc-

¹ U.S. CONST. amend I. The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." *Id.*

Historically, commentators have strongly disagreed over the intent of the framers in adopting the First Amendment. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.5, at 938 (4th ed. 1991) (questions concerning meaning of First Amendment are raised continually); see also THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES (1985) (historical perspective). For contrasting views of the framers' intent, compare ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 19-21 (1941) (to framers, freedom of speech meant right of unrestricted discussion of public affairs) with LEONARD WILLIAMS LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 35 (1960) (framers were not libertarians on subject of free expression).

² See, e.g., *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired") (citations omitted); *Cohen v. California*, 403 U.S. 15, 19 (1971) ("First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses").

Certain types of speech have long been considered to be outside the protection of the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, Justice Murphy stated the following:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the

trine," for instance, the government may regulate protected speech on publicly-owned property.³

The public-forum doctrine divides public property into three categories: traditional public fora,⁴ designated public fora,⁵ and

insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes omitted).

Some types of speech fall within the protection of the First Amendment, but are afforded less protection than other forms of expression. *See* NOWAK & ROTUNDA, *supra* note 1, § 16.1, at 934 (Supreme Court has developed various tests to evaluate restrictions on different types of speech). Commercial speech, for example, does not enjoy the same status as political speech. *Compare* *Cohen*, 403 U.S. at 26 (offensive language on jacket constituted political speech entitled to highest level of protection) *with* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 558, 561-66 (1980) (to come within protection of First Amendment, commercial speech must be neither misleading nor related to illegal activity).

³ *See* *United States v. Kokinda*, 110 S. Ct. 3115 (1990). Justice O'Connor summarized public-forum analysis as follows:

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny. But regulation of speech activity where the Government has not dedicated its property to First Amendment Activity is examined only for reasonableness.

Id. at 3119-20 (citations omitted).

Since the concept of a public forum was first enunciated, *see* *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), the public-forum doctrine has been subjected to unrelenting criticism because it focuses on the nature of the property to which restrictions on the freedom of speech are applied rather than considering the First Amendment values implicated by speech restrictions. *See* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (nonpublic-forum doctrine yields "inadequate jurisprudence of labels"); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234-35 (1984) (classification of public places into types of fora confuses judicial opinions by diverting attention from First Amendment issues); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 261 (1991) (doctrine is "incoherent" and "analytically dubious" and results in "overbroad, often senseless, cordoning off of public space from the first amendment."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987) (doctrine poses obstacle to "sensitive first amendment analysis" as well as "realistic appreciation of government's requirements in controlling its own property"); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (doctrine's "myopic focus on formalistic labels . . . serves only to distract attention from the real stakes").

⁴ *See, e.g.,* *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (sidewalk adjacent to private residence considered traditional public forum); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 90 (2d Cir.) (deeming Port Authority bus terminal traditional public forum), *cert. denied*, 393 U.S. 940 (1968).

nonpublic fora.⁶ While restrictions on the content of speech in nonpublic fora need only be reasonable, similar restrictions in areas "traditionally open to assembly" or "expressly dedicated to speech activity" must be narrowly drawn to achieve a compelling state interest.⁷ Because municipal airport terminals have consistently been deemed traditional public fora, efforts to exclude speakers from terminals have been subjected to the highest level of First Amendment scrutiny.⁸ Recently, however, in *International Society*

Once a court has determined that a forum is public, the government may enforce a content-based restriction on speech only if the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The government may also enforce content-neutral time, manner, and place restrictions if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*; see also *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (ordinance requiring permit for parades on public streets constitutes reasonable time, manner, place restriction).

⁶ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (university policy of making meeting facilities available to registered student groups creates public forum for their use); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (municipal auditorium and city-leased theater designed for and dedicated to expressive activities constitute public fora). A designated public forum is created when the government opens property to the public for purposes of expressive activity. *Perry Educ. Ass'n*, 460 U.S. at 45. Although the government need not keep the forum open indefinitely, so long as it does, restrictions on speech are subject to the same scrutiny applied to traditional public fora. *Id.* at 46. Thus, content-based prohibitions in designated public fora must be narrowly tailored to meet significant state interests, and restrictions on time, manner, and place are permitted only if reasonable. *Id.*

⁶ See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-15 (1984) (utility poles not traditional or designated public forum); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981) (letterbox not public forum).

When public property is not by tradition or designation a forum for public expression, it may be reserved "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46.

⁷ See *supra* notes 4-6 (case law involving three categories of fora).

⁸ See, e.g., *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 792-95 (9th Cir. 1986) (compelling governmental interest needed to justify limiting distribution of religious literature in airport), *aff'd on other grounds*, 482 U.S. 567 (1987); *United States S.W. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 774 (D.C. Cir. 1983) (governments must have compelling reasons to ban political advertisements in airports); *Fernandes v. Limmer*, 663 F.2d 619, 626-27 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925-26 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszyński v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973) (must be narrowly-drawn regulations which serve legitimate interests to limit distribution of written materials). But see *International Caucus of Labor Comm'n v. Dade County, Fla.*, 724 F. Supp. 917, 924 (S.D. Fla. 1989) (deeming Miami International Airport terminal nonpublic forum).

The Supreme Court has yet to address the status of airport terminals as public or nonpublic fora. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576,

for *Krishna Consciousness, Inc. v. Lee* ("ISKCON"),⁹ the United States Court of Appeals for the Second Circuit, determining that airport terminals are nonpublic fora for purposes of First Amendment analysis,¹⁰ upheld a regulation prohibiting the in-person solicitation of funds at three New York-area airports.¹¹ At the same time, the court recognized a distinction between "the disruptive effect of the in-person solicitation of funds and the lesser inconvenience of the distribution of literature" and struck down the portion of the regulation that prohibited the distribution of literature in airport terminals.¹²

In *ISKCON*, the plaintiffs challenged a regulation promulgated by the Port Authority of New York and New Jersey that prohibited the solicitation of funds and the distribution of literature in the terminals at Kennedy, LaGuardia, and Newark airports.¹³ The plaintiffs contended that because the terminal areas

578 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3083 (U.S. Jan. 10, 1992). Although presented with the opportunity in *Jews for Jesus, Inc.*, 482 U.S. at 573-75, which involved a challenge to a regulation prohibiting all First-Amendment activity in the terminals at Los Angeles International Airport, the Court found it unnecessary to decide the issue. *Id.* Rather, it invalidated the challenged regulation on the grounds that its overbreadth created a virtual "First Amendment Free Zone." *Id.* at 574. For an interesting discussion of the Court's decision in *Jews for Jesus, Inc.* and a critical view of public-forum analysis, see generally Lonnie S. Davis, Note, Board of Airport Comm'rs v. *Jews for Jesus, Inc.: A Missed Opportunity to Restore Fundamental Fairness to Public Forum Analysis*, 8 PACE L. REV. 607, 626 (1988).

⁹ 925 F.2d 576 (2d Cir. 1991), *petition for cert. granted*, 60 U.S.L.W. 3475 (U.S. Jan. 10, 1992).

¹⁰ *Id.* at 581.

¹¹ *Id.* at 581-82.

¹² *Id.* at 582.

¹³ *Id.* at 577-78. ISKCON is a nonprofit religious corporation, whose members practice a religious ritual known as *sankirtan*. *Id.* at 577. This ritual requires members of the organization to disseminate religious literature and to solicit funds in order to support the religious movement of the group as well as to defray printing and distribution costs. *Id.* at 577-78. The Port Authority regulation affecting the New York-area airports states, in pertinent part, the following:

1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.

(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

Id. at 578-79.

Although the members of ISKCON originally challenged the regulation as applied to both the leased and unleased portions of the airport, the litigants reached a settlement on those areas leased to the airlines, and thus the court needed to decide only whether the

were physically and conceptually analogous to public streets and sidewalks, they should be considered traditional public fora.¹⁴ The district court, agreeing with this assessment and determining that the Port Authority regulation was not narrowly tailored to further a compelling state interest,¹⁵ declared the regulation unconstitutional and granted the plaintiffs' motion for summary judgment.¹⁶ On appeal, the Second Circuit reversed in part, holding that the terminal areas are nonpublic¹⁷ and that the government may therefore regulate protected speech in the terminals, provided that such regulations are reasonable and viewpoint neutral.¹⁸

Writing for the court, Justice Winter recognized that "[t]he 'well-established' authority in other circuits is that airport terminals are traditional public fora for speech activities."¹⁹ Nevertheless, he concluded that the Supreme Court's recent decision in *United States v. Kokinda*,²⁰ altered the traditional public-forum

regulations were permissible in those portions under the control of the Port Authority. *Id.* at 578.

¹⁴ See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572, 575 (S.D.N.Y. 1989), *aff'd in part, rev'd in part*, 925 F.2d 576 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3083 (U.S. Jan. 10, 1992). The plaintiffs argued that the terminal buildings, "[l]ined with all type of services 'from banks to barbers to Bloomingdales' . . . possess the characteristics of a bustling metropolitan boulevard . . . [and thus] 'fit well within the notion of traditional public fora.'" *Id.* at 576-77 (quoting Plaintiffs' Memorandum of Law at 25-26, 37, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989)).

¹⁵ *Id.* at 577-79. The district court first set out the three-part forum analysis enunciated in *Perry Educ. Ass'n*, see *id.* at 575, and then specifically relied on decisions in other circuits that held that various factors are to be considered when determining the status of airports as public or nonpublic fora. *Id.* at 577.

¹⁶ *Id.* at 579. The district court agreed with plaintiffs that the terminals "possess the characteristics of a bustling metropolitan boulevard." *Id.* at 576 (citing Plaintiffs' Memorandum of Law at 37, *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989)). Noting that numerous Supreme Court decisions "have invited extension of the traditional public forum concept by analogy," the court held that the terminals, "as the functional equivalent of public streets, . . . fit 'well within the notion of traditional public fora.'" *Id.* at 577.

¹⁷ *ISKCON*, 925 F.2d. at 581.

¹⁸ *Id.* at 580. Applying this standard, the court held that the regulation prohibiting solicitation of funds did not violate the First Amendment because it was reasonably intended to prevent disruption of air travelers. *Id.* at 582. The court found no similar justification for the regulation prohibiting distribution of literature and therefore held this restriction to be violative of the First Amendment. *Id.*

¹⁹ *Id.* at 580 (citation omitted).

²⁰ 110 S. Ct. 3115 (1990). In *Kokinda*, the plaintiffs, a political advocacy group, solicited contributions on a sidewalk directly in front of the entrance to a post office. *Id.* at 3117. The sidewalk, located entirely on post-office property and used exclusively for postal purposes, constituted the sole means by which post office customers could travel from the parking lots

analysis²¹ and mandated a different result.²² The *ISKCON* court interpreted the plurality opinion in *Kokinda* as requiring courts to determine the status of a forum not by assessing the overall character of the property, but by simply identifying the purpose for which the property exists.²³ Employing this single-faceted analysis, the *ISKCON* court determined that because airport terminals exist solely for the purpose of facilitating air travel, they are nonpublic fora in which the government may properly prohibit the solicitation of funds to prevent inconvenience to the public.²⁴

In a strong dissent, Chief Judge Oakes rejected the majority's assessment of *Kokinda*,²⁵ which he found "neither controlling nor a substantial deviation from the Court's [traditional] public forum analysis."²⁶ Specifically, Chief Judge Oakes rejected the proposition that a forum's purpose alone can determine its status²⁷ and argued that *Kokinda* merely reaffirmed the traditional public-forum analysis, which turns not on a single factor, but on a complex balancing of the character, pattern of activity, and essential pur-

to the post office building. *Id.* at 3118. The plaintiffs were convicted of violating a postal regulation prohibiting solicitation of money on postal premises. *Id.* In upholding the regulation, Justice O'Connor, writing for a plurality of the Court, concluded that the sidewalk was nonpublic for First Amendment purposes. *Id.* at 3120. In reaching this conclusion, Justice O'Connor considered the physical character of the sidewalk, the degree of public access, its tradition of use as a public forum, and its purpose and location. *Id.*; see also *infra* notes 45-48 and accompanying text (discussion of sidewalk characteristics in *Kokinda*).

²¹ *ISKCON*, 925 F.2d at 580; see also *infra* note 23 and accompanying text (*ISKCON* court's interpretation of plurality opinion in *Kokinda*).

²² *ISKCON*, 925 F.2d at 580.

²³ *Id.* at 581. Specifically, the *ISKCON* court stated the following:

We read the plurality opinion of Justice O'Connor to distinguish between passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor—subway or air travel for example—and passageways or facilities that enable the public to carry out the multitude of purposes persons pursue in their daily life—the typical Main Street. The former are non-public fora . . .

Id.

²⁴ *Id.* at 581.

²⁵ *Id.* at 584 (Oakes, C.J., dissenting) ("I would agree with the district court that the airport terminals at issue are traditional public fora.").

²⁶ *Id.* at 583 (Oakes, C.J., dissenting).

²⁷ *Id.* at 584 (Oakes, C.J., dissenting). Chief Judge Oakes explained that even reading *Kokinda* as controlling, there is no basis to conclude from the plurality's opinion that a forum's purpose will, *ipso facto*, illuminate its status. In concluding that the postal sidewalk was not a traditional public forum, Justice O'Connor assessed not only the postal sidewalk's purpose, but also its location, the degree of public access afforded by the sidewalk, and whether such sidewalks had "traditionally served as a place for free public assembly and communications of thoughts by private citizens."

Id. (citations omitted) (quoting *Kokinda*, 110 S. Ct. at 3120).

pose of a forum.²⁸

It is submitted that the *ISKCON* court erred in holding that airport terminals are nonpublic fora. More importantly, it is suggested that the court's interpretation of *Kokinda* distorts the public-forum doctrine and seriously endangers basic First Amendment protections. This Comment will first survey the approach taken by other circuits in applying the public-forum doctrine to airport terminals. Next, it will analyze the Supreme Court's decision in *Kokinda* and assert that the *ISKCON* court misinterpreted that decision as disposing of the need to weigh the First Amendment rights of individuals against the proprietary rights of the government. Finally, it will urge the Supreme Court to seize this opportunity to resolve the status of airport terminals for First Amendment purposes and to articulate a coherent standard to guide courts confronted with this issue in the future.

I. AIRPORTS AND PUBLIC-FORUM DOCTRINE: THE TRADITIONAL APPROACH

Under the traditional public-forum doctrine, numerous factors are weighed to determine what level of scrutiny will be applied to restrictions on protected speech.²⁹ These factors were articulated by the United States Court of Appeals for the Fifth Circuit in *Fer-*

²⁸ *Id.*

[T]he majority is simply wrong in concluding that *Kokinda* stands for the immutable proposition that facilities that exist solely for the "public's carrying on of a particular endeavor . . . are nonpublic fora."

In short, I believe that *Kokinda* reaffirms the basic proposition that traditional public forum status does not turn on any single factor or characteristic. Rather, a more complex balancing determination is necessary, in which it must be determined whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance." In other words, we balance the governmental purposes of the forum on the one hand against the tradition of public access to that forum, and the interests of those who wish to use the forum for another purpose, on the other hand.

Id. (alteration in original) (citations omitted).

²⁹ See Dienes, *supra* note 3, at 114 ("character of the forum, the relationship of the speech to the place of protest, and the degree of interference with the normal functioning of the forum are all variables" in balancing government's proprietary interests against speaker's First Amendment rights); see also Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 16 (discussing early development of public-forum theory and numerous factors and interests to be weighed).

nandes v. Limmer.³⁰ According to the Fifth Circuit, courts should consider the "character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation" in determining whether the property is an "appropriate place for communication of views on issues of political and social significance."³¹ Applying these criteria, the *Fernandes* court concluded that the Dallas-Fort Worth Airport terminal contained areas that were public fora.³²

Prior to *Fernandes*, the United States Court of Appeals for the Seventh Circuit, in *Chicago Area Military Project v. City of Chicago* ("CAMP"),³³ considered these same factors and observed the similarities between the O'Hare Airport terminal and a public street, traditionally open to First Amendment speech, before concluding that the airport terminal was a public forum.³⁴

³⁰ 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982). In *Fernandes*, a member of the International Society of Krishna Consciousness, Inc., sought to enjoin enforcement of an ordinance banning distribution of literature and solicitation of funds at the Dallas-Fort Worth airport complex. *Id.* at 623. The Fifth Circuit invalidated the ordinance on the grounds that it was overbroad and that it unduly restricted protected speech. *Id.* at 633; *see also infra* note 32 (setting forth *Fernandes* court's rationale for concluding that terminals were public fora).

³¹ *Fernandes*, 663 F.2d at 626 (citing *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1019 (5th Cir. 1972) (quoting *Wolin v. Port of New York Auth.*, 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968))).

³² *Id.* The *Fernandes* court noted that the airport complex served the major cities of Dallas and Fort Worth and functioned as a hub for connecting regional air traffic. *Id.* at 623-24. In addition, the complex, covering 18,000 acres, contained a hotel, bank, and numerous commercial establishments. *Id.* In considering these factors, the *Fernandes* court stated that "[i]n view of the lack of restrictions on entry by the general public, and the commercial, street-like character of the terminal concourses, . . . the . . . terminal buildings must be treated as public for[a]." *Id.* at 627. The court distinguished, however, the terminal areas that are available to the public from those areas available only to airline personnel and ticketed passengers. *Id.* In so doing the court pointed out that "those parts of the terminals restricted to airline personnel are private, absent unusual circumstances. Likewise, the arrival and departure gates, where only ticketed passengers may go, are not public forums." *Id.*

³³ 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). The plaintiffs in *CAMP* were members of a nonprofit political advocacy group who were threatened with arrest by city police for distributing the group's newspaper to members of the armed forces and to the general public in the terminal buildings of O'Hare Airport in Chicago. *Id.* at 923. The defendants claimed that this activity was prohibited by an oral regulation providing in substance that no person "shall be permitted to picket, sell anything . . . distribute literature of any nature, or solicit or collect contributions within any building at any airport operated by the City of Chicago." *Id.* at 924.

³⁴ *Id.* at 925. The defendants in *CAMP* raised arguments similar to those raised by the defendants in *ISKCON*. Compare *ISKCON*, 925 F.2d at 578-79 with *CAMP*, 508 F.2d at 924-25. For instance, the *CAMP* defendants argued that the terminal areas were nonpublic because their "function, location, and often congested condition" made them inappropriate fora for protected speech. *Id.* at 925. Furthermore, the defendants claimed that the invita-

More recently, both the Ninth and Eighth Circuits have held that airport terminals are public fora. In *Jews for Jesus, Inc. v. Board of Airport Commissioners*,³⁵ the Ninth Circuit invoked the criteria set forth in *Fernandes*³⁶ and *CAMP*³⁷ and found that the Los Angeles International Airport terminal was a public forum.³⁸ Similarly, in *Jamison v. City of St. Louis*,³⁹ the Eighth Circuit

tion to the public to enter the terminal was limited to the purpose of air travel. *Id.* The *CAMP* court rejected the former argument by distinguishing nonpublic fora such as hospitals, libraries, office buildings, and prisons, whose function may require restrictive regulation of protected speech, from the nonsecured, wide-open spaces of the terminals at O'Hare Airport, which are freely accessible to the general public. *Id.*; see also *United States S.W. Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983) ("Although not every form of speech is necessarily consistent with the airports' primary use, it seems clear that the public places in these airports are far more akin to such public [fora] as streets and common areas than [to such nonpublic fora] as prisons, buses, and military bases.").

CAMP also rejected the defendants' argument that the purpose of the terminal was limited to facilitating air travel as being neither "supported by the evidence" nor "realistic" and noted that "great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity." *CAMP*, 508 F.2d at 925.

³⁵ 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987). In *Jews for Jesus*, a minister of a religious group was approached by a Department of Airports peace officer while he was distributing free literature in the terminal of the Los Angeles International Airport. *Id.* at 792. The minister was shown a resolution promulgated by the Board of Airport Commissioners that banned all First Amendment activities within the terminal area of the airport, was told his activities violated this resolution, and was threatened with legal action if he persisted. *Id.* The resolution was challenged, and the Ninth Circuit affirmed the district court's ruling that the terminal was a traditional public forum and invalidated the resolution, finding its total ban on First Amendment activities to be unconstitutional. *Id.* at 795.

³⁶ *Id.* at 795; see also *supra* note 32 and accompanying text (discussing specific aspects of *Fernandes* case).

³⁷ *Jews for Jesus*, 785 F.2d at 794; see also *supra* notes 33-34 and accompanying text (discussing specific aspects of *CAMP* case).

³⁸ *Jews for Jesus*, 785 F.2d at 794-95. The *Jews for Jesus* court relied on its earlier rulings in *Rosen v. Port of Portland*, 641 F.2d 1243, 1245 (9th Cir. 1981) (First Amendment to be given full effect in public areas of airport terminals) and *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973) (because airport is public property, "free speech may be abridged only by regulations narrowly drawn to serve legitimate interests of the general public") to conclude that the Los Angeles International Airport terminal was a public forum. *Jews for Jesus*, 785 F.2d at 793-95.

³⁹ 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). In *Jamison*, a former airline employee submitted a written request to the director of the Lambert-St. Louis Airport for permission to picket his former employer in protest for what he believed was a discriminatory discharge based upon his mental illness. *Id.* at 1281. Specifically, Jamison requested permission to picket "at the foot of concourse C, near the glass wall, to be sure that [he did] not obstruct any passenger traffic, which . . . [was] not [his] intention." *Id.* Based upon the director's fear that Jamison's manic-depressive mental disorder would render him a danger to the public, the director refused to grant him permission to picket.

noted that the Lambert-St. Louis Airport terminal, "lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please" resembled a traditional public thoroughfare and was thus a public forum for purposes of First Amendment analysis.⁴⁰

Although the *ISKCON* court acknowledged the heavy weight of authority in other circuits holding that airport terminals are public fora,⁴¹ it reached the opposite conclusion based upon its reading of the Supreme Court's decision in *Kokinda*.⁴²

II. *ISKCON*'S INTERPRETATION OF *Kokinda*

In *Kokinda*, the United States Supreme Court addressed the question of whether a postal sidewalk, lacking the characteristics of a public sidewalk traditionally open to First Amendment activity, nevertheless constituted a public forum.⁴³ In concluding that the postal sidewalk was not a traditional public forum,⁴⁴ the Court

Id. at 1281 n.3. However, because the city was unable to demonstrate that Jamison was, in fact, a danger to the public or that excluding all persons with Jamison's form of mental illness would further the city's legitimate interests in security and efficiency, the *Jamison* court concluded that the denial of permission to picket violated Jamison's First Amendment rights. *Id.* at 1284.

⁴⁰ *Id.* at 1283. The *Jamison* court noted that under the analysis delineated in *CAMP, Fernandes*, and their progeny, the terminal at Lambert-St. Louis Airport was a traditional public forum. *Id.* In addition, the court relied on a city rule that implicitly acknowledged "that the concourse of a large airport facility . . . has the character, pattern of activity, and nature of purpose that make it an appropriate place for the communication of views." *Id.*

The analogy between airport terminals and public thoroughfares was also addressed in *Gannett Satellite Info. Network, Inc. v. Berger*, 716 F. Supp. 140, 150 (D.N.J. 1989), *rev'd in part*, 894 F.2d 61 (3d Cir. 1990), in which the court recognized the similarities between airport terminals and public streets, but noted the different functions served by each. *Id.* In particular, the *Gannett* court found the two places to be analogous as "natural gathering places for people with an interest and expectation that certain types of public activity are permitted and in fact will take place," but stated that airports lacked a long tradition of devotion to public assembly, contained a limited amount of space, and were maintained primarily to serve air travelers. *Id.* Nevertheless, the *Gannett* court concluded that these differences alone were insufficient for airports to be deemed nonpublic fora; rather, the court suggested that these "subtle differences and competing interests" should be recognized and balanced in analyzing the status of the forum. *Id.* at 149-50. Because the appellant did not challenge the district court's analysis, the Third Circuit accepted the district court's finding that the terminal area of Newark Airport (one of the airports at issue in *ISKCON*) was a public forum. *Gannett*, 894 F.2d at 64.

⁴¹ See *ISKCON*, 925 F.2d at 580.

⁴² *Id.* at 580-82; see also *supra* notes 21-23 and accompanying text (discussing *ISKCON* court's interpretation of *Kokinda*).

⁴³ See *supra* note 20 (setting forth facts of *Kokinda*).

⁴⁴ *Kokinda*, 110 S. Ct. at 3120. Chief Justice Rehnquist and Justices White and Scalia

considered several factors, including the physical character of the property,⁴⁵ its traditional use as a forum for expressive activity,⁴⁶ its purpose and location,⁴⁷ and the degree of public access afforded by the sidewalk.⁴⁸ Writing for the plurality, Justice O'Connor emphasized that the postal sidewalk was constructed "solely to assist postal patrons" in obtaining access to the post office and "not to facilitate the daily commerce and life of the neighborhood or city."⁴⁹ The *ISKCON* court seized upon this language in concluding that *Kokinda* had altered the public-forum doctrine to require an analysis focusing solely on the purpose for which a forum is used.⁵⁰ Despite Justice O'Connor's recognition of the other factors

joined Justice O'Connor in concluding that the sidewalk was nonpublic. *Id.* at 3115. Justice Kennedy, who concurred in the judgment, found it unnecessary to decide the status of the postal sidewalk because he construed the postal regulation as a reasonable time, manner, and place restriction that would be constitutional regardless of whether the sidewalk was public or nonpublic. *Id.* at 3125-26 (Kennedy, J., concurring). Justice Kennedy observed, however, that "there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum." *Id.* at 3125 (Kennedy, J., concurring).

⁴⁵ *Id.* at 3120. Noting that the "mere physical characteristics of the property cannot dictate forum analysis," *Kokinda* compared the character of the postal sidewalk at issue to that of a nearby municipal sidewalk, a sidewalk located inside a military base, and a sidewalk located on a public street, and determined that the postal sidewalk did not have the "characteristics of public sidewalks traditionally open to expressive activity." *Id.*

⁴⁶ *Id.* at 3121. The court in *Kokinda* assessed whether the postal sidewalk had "traditionally served as a place for free public assembly and communication of thoughts by private citizens," *id.* (quoting *Greer v. Spock*, 424 U.S. 828, 838 (1976)), and concluded that it was this inquiry that "animated our traditional public forum analysis and that we apply today." *Id.*

⁴⁷ *Id.* The *Kokinda* court reiterated a well-recognized principle of traditional public-forum analysis in stating that the "location and purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Id.*

⁴⁸ *Id.* at 3120. *Kokinda* distinguished the right of access afforded to the public by the postal sidewalk from that afforded by the quintessential residential public sidewalk at issue in *Frisby v. Schultz*, 487 U.S. 474 (1988) (acknowledging right of access to residential streets but upholding ban on "focused" picketing).

⁴⁹ *Kokinda*, 110 S. Ct. at 3120.

⁵⁰ *ISKCON*, 925 F.2d at 580. After determining that the status of airport terminals depends solely on their purpose, the *ISKCON* court concluded that the sole purpose of airport terminals is to serve air travelers. *Id.* at 581.

Persons using the passageways in terminals are not there primarily to meet a friend for lunch, windowshop, take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used. They are there solely as air travelers, persons connected with air travelers, or employees of businesses serving air travelers.

Id. However, this conclusion has been rejected by other circuit courts. See, e.g., *CAMP*, 508 F.2d at 925 ("great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection with air travel, but also for shopping, dining, sightsee-

to be considered in a public-forum analysis,⁵¹ the *ISKCON* court looked only to purpose and concluded that airport terminals are nonpublic fora because they "exist solely to accommodate the needs of air travelers."⁵²

While the purpose served by property has always been a significant element in traditional public-forum analysis,⁵³ it has never been the sole consideration and was only one of several factors discussed in *Kokinda*.⁵⁴ It is therefore submitted that the Second Circuit misapplied *Kokinda*, and that the traditional multifaceted analysis continues to be the governing standard for determining the level of scrutiny applicable to governmental regulation of First Amendment freedoms.

The *ISKCON* court's belief "that *Kokinda* has altered public forum analysis"⁵⁵ contrasts with other circuits' adherence to the traditional public-forum doctrine.⁵⁶ Indeed, in *Paulsen v. County of Nassau*,⁵⁷ decided only four days prior to *ISKCON*, the Second Circuit itself invoked the public-forum doctrine without suggesting that it had been altered by the *Kokinda* Court.⁵⁸ The *Paulsen* case arose from the restriction of protected speech in and around the

ing, or merely to satisfy their curiosity"); *Fernandes*, 663 F.2d at 627 ("The parallel between public streets and . . . terminal buildings, where air travelers as well as the general public may shop, dine, imbibe, and sightsee, is clear and powerful.").

⁵¹ *Kokinda*, 110 S. Ct. at 3120-21; see also *supra* notes 45-48 (setting forth factors considered).

⁵² *ISKCON*, 925 F.2d at 581 (Oakes, C.J., dissenting).

⁵³ See, e.g., *Greer v. Spock*, 424 U.S. 827, 837-38 (1976) (national security purposes of military post weighed heavily in favor of finding that military reservation was not traditional public forum); *Pearson v. United States*, 581 A.2d 347, 353 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 51 (1991) (integrity of judicial process was significant factor in finding that Supreme Court grounds are not traditional public fora).

⁵⁴ See *Kokinda*, 110 S. Ct. at 3120-21; see also *supra* notes 43-48 (court must consider physical characteristics, purpose, location and traditional use). "While it is proper to weigh the need to maintain the dignity and purpose of a public building . . . other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended." *Kokinda*, 110 S. Ct. at 3125 (Kennedy, J., concurring).

⁵⁵ *ISKCON*, 925 F.2d at 580.

⁵⁶ See, e.g., *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991); *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991); see also *infra* notes 59-72 and accompanying text (Tenth and Eleventh Circuits did not view *Kokinda* as altering public-forum doctrine).

⁵⁷ 925 F.2d 65 (2d Cir. 1991).

⁵⁸ See *id.* at 69-71. Circuit Judges Kaufman, Newman, and McLaughlin heard *Paulsen*, *id.* at 66, whereas Chief Judge Oakes and Circuit Judges Winter and Miner decided *ISKCON*. *ISKCON*, 925 F.2d at 577.

Nassau County Veteran's Memorial Coliseum.⁵⁹ In determining that the coliseum was a designated public forum,⁶⁰ the *Paulsen* court considered several factors, including government intent,⁶¹ the purpose of the property,⁶² its tradition of use for expressive activity,⁶³ the nature of the property, and its compatibility with expressive activity.⁶⁴ It must be emphasized, of course, that although both *Kokinda* and *ISKCON* involved traditional public-forum questions, the issue in *Paulsen* was whether the coliseum was a designated public forum.⁶⁵ Nevertheless, the *Paulsen* court cited

⁵⁹ *Paulsen*, 925 F.2d at 67. In *Paulsen*, members of the Christian Joy Fellowship sought a preliminary injunction after they were arrested for distributing religious leaflets on the sidewalks and in the mall surrounding the Nassau County Veterans' Memorial Coliseum. *Id.* at 67-68. The coliseum, which is publicly owned and privately managed, consists of an 18,000 seat arena surrounded by "sidewalks, pedestrian thoroughfares and numerous parking lots." *Id.* at 67. The district court granted the injunction, concluding that the coliseum was a designated public forum subject only to reasonable time, place, and manner restrictions absent a compelling state interest. *Id.* at 68. In affirming the district court's ruling, the Second Circuit rejected the county's argument that because the coliseum had been built for the purpose of making money, it was nonpublic. *Id.* at 70. Instead, in gleaning the government's intent with respect to the coliseum, the court applied a multifaceted analysis in which purpose was but one of the factors considered. *See id.* at 69-71; *see also infra* notes 60-64 and accompanying text.

⁶⁰ *Paulsen*, 925 F.2d at 71.

⁶¹ *Id.* at 69. Although it recognized that the government's intent is essential in determining whether a public forum has been created, the *Paulsen* court observed that "[i]ntent is not merely a matter of stated purpose" and "must be inferred from a number of objective factors." *Id.*

⁶² *Id.* at 69-70. In assessing the purpose served by the coliseum, the *Paulsen* court looked to the Nassau County Charter, which provided that "the Coliseum may be leased for 'education, enlightenment, cultural development or betterment, . . . and . . . civic, community and general public interest.'" *Id.* at 69 (quoting Nassau County Charter § 2206-a(2)(a)). In addition, the court recognized that the Nassau County Board of Supervisors had made efforts to regulate the distribution of commercial, rather than noncommercial, literature. *Id.* at 70. In light of the "strong indicia" of intent to dedicate the coliseum to the public, *Paulsen* rejected the county's argument that the coliseum was constructed for the purpose of "generat[ing] economic benefits" and should thus be considered nonpublic. *Id.*

⁶³ *Id.* at 70. The *Paulsen* court noted that the coliseum had been used for "parades, political rallies and speeches, religious weddings and circuses," had hosted "rent-free charitable events," had permitted patrons to routinely display banners containing political messages, and, before the current management took over, had regularly permitted solicitation of contributions and distribution of literature by personal interest groups. *Id.*

⁶⁴ *Id.* at 70-71. Noting that the coliseum grounds "contain[] a large outside area which includes a mall and a network of sidewalks" and is "frequently the site of boisterous recreational activity," the *Paulsen* court distinguished the coliseum from "a post office, military base[] or [a] federal workplace[]." *Id.* at 70 (citations omitted).

⁶⁵ Compare *id.* at 71 (classifying coliseum as "public forum by government designation") with *Kokinda*, 110 S. Ct. at 3118 (lower court "held that the postal sidewalk is a traditional public forum") and *ISKCON*, 925 F.2d at 577 (terminals "are traditional public fora for expressive activity").

Kokinda to support basic constitutional principles without finding that the Supreme Court had in any way modified the public-forum doctrine.⁶⁶

Two other circuit courts have similarly acknowledged *Kokinda* without deviating from the traditional public-forum doctrine.⁶⁷ In *Sentinel Communications Co. v. Watts*,⁶⁸ the Eleventh Circuit examined government intent as well as the nature and purpose of public rest areas and determined that a Florida interstate rest area was a nonpublic forum.⁶⁹ Furthermore, in *Brown v. Palmer*,⁷⁰ the Tenth Circuit focused on the government's intent in conducting open-house celebrations at an airforce base and concluded that "the military did not intend to open [the base] to plaintiffs and other individuals or groups seeking to convey ideological or political messages."⁷¹ Like *Paulsen*, neither *Sentinel* nor *Brown* interpreted *Kokinda* as having any impact on the public-forum doctrine,⁷² and it is suggested that these cases support the conclusion

⁶⁶ See *Paulsen*, 925 F.2d at 70-71.

⁶⁷ See *supra* note 56 and *infra* notes 68-72 and accompanying text.

⁶⁸ 936 F.2d 1189 (11th Cir. 1991).

⁶⁹ *Id.* at 1203-04. In *Sentinel*, a newspaper publisher challenged a state regulation prohibiting the installation of coin-operated newsracks in two public rest areas along an interstate highway in Florida. *Id.* at 1191. The regulation made it "unlawful to make any commercial use of the right-of-way of any state-maintained road, including . . . rest areas." *Id.* at 1191 n.1 (quoting FLA. STAT. ANN. § 337.406 (West 1989)).

The *Sentinel* court characterized the establishment of rest areas as primarily a "safety measure" that provides for "emergency stopping and resting by motorists for short periods" and distinguished rest areas from local parks in that "[a]reas for family leisure picnics, active recreation, waterfront activities, or overnight camping are not to be developed as part of an Interstate highway." *Id.* at 1204.

In deciding that a rest area was not a designated public forum, the *Sentinel* court emphasized the terms "safety" and "rest" and determined that the nature and purpose of an interstate rest area, while necessarily permitting "chatting and stretching one's legs, or relaxing . . . with a newspaper," did not "amount to the dedication of such property to speech activities." *Id.*

⁷⁰ 915 F.2d 1435 (1990), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991).

⁷¹ *Id.* at 1443. The *Brown* court noted the special nature of military bases and the judicial reluctance to label such governmental property as a public forum. *Id.* at 1441 ("The Supreme Court has repeatedly indicated that a military base can be transformed into a public forum only in extreme circumstances."). Applying the standard set forth by the Supreme Court in *Flower v. United States*, 407 U.S. 197 (1972), which marks the only time such "extreme circumstances" were found to exist, the *Brown* court concluded that because the government had not "abandoned any claim of special interest in regulating the open house celebrations," the airforce base was not a public forum. *Brown*, 915 F.2d at 1441-43.

⁷² See, e.g., *Sentinel*, 936 F.2d at 1201 (citing *Kokinda* in support of different levels of scrutiny to be applied to "tripartite conceptual framework" developed under public-forum doctrine); *Brown*, 915 F.2d at 1443 (citing *Kokinda* for proposition that government does not designate its property for expressive activities merely by permitting limited discourse by

that *Kokinda* has not reduced the traditional public-forum doctrine to a simplistic "purpose" analysis.

III. POTENTIAL CONSEQUENCES OF *ISKCON*

Through its restrictive construction of *Kokinda*, the *ISKCON* court dismissed over twenty years of precedent affecting a wide variety of fora. Rather than balancing the First Amendment interests of individuals against the legitimate proprietary concerns of the government, the *ISKCON* analysis focused solely on the purpose of airport terminals.⁷³ The flaw in this analysis is that it is difficult to imagine any government-owned property that exists solely for the purpose of expressive activity.⁷⁴ Under the *ISKCON* analysis, it appears that even public streets, sidewalks, and parks, historically considered traditional public fora, arguably could be deemed non-public. Such a result would eviscerate basic First Amendment protections and would provide ammunition to critics who claim that the public-forum doctrine emphasizes the technical nature of property at the expense of fundamental First Amendment values.⁷⁵

IV. SUPREME COURT REVIEW

The *ISKCON* case was decided by the Second Circuit in February 1991.⁷⁶ Subsequently, the plaintiffs petitioned for rehearing en banc.⁷⁷ The en banc petition was denied by a majority of the court without comment, but three judges dissented and urged that the court review the ruling.⁷⁸ Writing for the dissent, Chief Judge Oakes urged reconsideration of the case to resolve the "clear-cut conflict among the circuits" created by the majority's characterization of airport terminals as nonpublic fora,⁷⁹ to clarify the Second

some individuals or groups).

⁷³ See *supra* notes 50-52 and accompanying text.

⁷⁴ See *ISKCON*, 925 F.2d at 583. (Oakes, C.J., dissenting). Chief Judge Oakes illustrated this fact by noting that the Supreme Court has previously held that the primary purpose of a public thoroughfare, which is recognized as the model public forum, is to facilitate the movement of people and property and not to foster First Amendment activity. *Id.*

⁷⁵ See *supra* note 3; see also Davis, *supra* note 8, at 629-30 (suggesting that in *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Supreme Court missed an opportunity to refocus public-forum doctrine on First Amendment considerations).

⁷⁶ *ISKCON*, 925 F.2d at 576.

⁷⁷ *Id.* at 587.

⁷⁸ *Id.* at 587-88 (Oakes, C.J., dissenting on petition for rehearing). Chief Judge Oakes was joined in his dissent by Circuit Judges Newman and Cardamone.

⁷⁹ *Id.* at 587 (Oakes, C.J., dissenting on petition for rehearing).

Circuit's understanding of *Kokinda*,⁸⁰ and to reconcile the panel's conclusion that a forum's purpose alone determines its status as a public or nonpublic forum.⁸¹ For these reasons, and because adoption of the *ISKCON* rationale will endanger First Amendment protections,⁸² the Supreme Court, having granted certiorari,⁸³ should use this opportunity to settle these issues once and for all.

CONCLUSION

This Comment has suggested that airport terminals should be considered public fora under the traditional public-forum analysis reaffirmed by the Supreme Court in *Kokinda*. According to the Second Circuit, however, because an airport terminal exists "solely to facilitate . . . air travel,"⁸⁴ it is nonpublic, and, consequently, content-based restrictions on speech in airport terminals will not be subjected to the strict scrutiny applicable to public fora. The *ISKCON* court read *Kokinda* as requiring courts to focus solely on the purpose of property in determining whether that property is public or nonpublic. If this interpretation is permitted to stand and is adopted by other circuits, the public-forum doctrine will cease to be a useful method for balancing First Amendment rights of individuals against the government's proprietary right to control the use of its property. Rather, it will become a dangerous tool capable of repressing basic First Amendment freedoms of speech and expression. At a time when it seems that individual freedoms are under constant attack from both legislators and the judiciary, the Supreme Court should seize the opportunity to prevent the addition of another weapon to the government's arsenal.

Barbara Lynn Hall

⁸⁰ *Id.*

⁸¹ *Id.* Chief Judge Oakes reiterated his belief that a forum's status should not be determined solely on the basis of purpose but that the court should adhere to its "longstanding doctrine that the status of a forum is determined by a complex balancing of competing factors, none of which alone is dispositive." *Id.* at 587-88 (Oakes, C.J., dissenting on petition for rehearing).

⁸² *Id.* at 587 (Oakes, C.J., dissenting on petition for rehearing) ("[T]he panel's reading of *Kokinda* will, at a minimum, constitute bad law for our circuit, and, at most, have extremely deleterious consequences for future public fora jurisprudence.").

⁸³ Petition for certiorari was filed on July 24, 1991 and granted Jan. 10, 1992. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 3475 (U.S. 1992).

⁸⁴ *ISKCON*, 925 F.2d at 581.